IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA,	:	
	:	
Plaintiff,	:	
	:	
v.	:	**Case No. 4:05-CV-00329-GKF-PJC**
	:	
TYSON FOODS, INC., *et al.*,	:	
	:	
Defendants.	:	

STATE OF OKLAHOMA'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO COMPEL PRODUCTION OF EXPERT MATERIALS (DKT. #1854)

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Other Authority

COMES NOW Plaintiff, the State of Oklahoma ("the State"), and respectfully opposes Defendants' Motion to Compel Production of Expert Materials (Dkt. #1854) (hereinafter "Defendants' Motion"). Defendants' Motion raises some of the same issues addressed in the State's Motion for Protective Order and Integrated Memorandum in Support (Dkt. #1853), and also raises additional issues and arguments, to which the State responds below. Defendants' Motion, and the accompanying request for a three-month extension of Defendants' deadline for expert disclosures on damages, should be denied in their entirety.

I. INTRODUCTION

The State has met the expert disclosure requirements for its reports on damages, including requirements for the report entitled "Natural Resource Damages Associated with Aesthetic and Ecosystem Injuries to Oklahoma's Illinois River System and Tenkiller Lake" (hereinafter "CV Report"), which is the focus of Defendants' Motion. Defendants' Motion sets forth an inaccurate portrayal of the State's disclosures and the exchanges between counsel. Rather than make a reasonable effort to review the materials produced to them, and move forward with discovery depositions of the authors of the CV Report offered by the State, Defendants have attempted to conduct discovery through exhaustive and repetitive email exchanges with counsel, they have refused to proceed with depositions of the authors of the CV Report (who would be the appropriate source for answers to their many inquiries about the CV Report), and they have tried multiple maneuvers – including three subpoenas – to obtain material that is confidential personal identifying information of study participants. Defendants have had all the materials they need to prepare their expert reports on damages in their possession since early January, they have suffered no prejudice, and there is no good cause for extending their deadline for disclosure of their expert reports on damages.

Defendants argue that they are entitled to all of the names and contact information for the individuals who participated in various activities undertaken by the authors of the CV Report. For the reasons explained below, and set forth in the State's Motion for Protective Order (Dkt. #1853), that information is not necessary for Defendants to assess and respond to the CV Report, and it should not be disclosed to the Defendants. To provide context for the Court about the information in dispute, the State provides a brief overview of the timeline of events that preceded the CV Report.

II. CV REPORT TIMELINE

Prior to the main survey of Oklahoma residents that is the subject of the analysis set forth in the CV Report, the authors of the CV report conducted several activities that were precursors to the creation of the survey instrument used in the final survey. The first activity was an intercept recreation study, conducted in the summer of 2006, in which individuals recreating were interviewed about their visits and recreation activities. This survey was undertaken for the State's experts to gain an understanding of the levels of use of the natural resources at issue and the public's thoughts about those resources. All of the materials that exist that pertain to this study were produced to Defendants on January 5, 2009.

The next activity undertaken by the State's experts was a telephone survey of Oklahoma residents. The goal of this survey was threefold: (1) to gain an understanding of people's knowledge of and use of Oklahoma rivers; (2) to gain an understanding of people's knowledge of the Illinois River Watershed; and (3) to gain an understanding of the impacts of the Defendants' media campaign.[1] A copy of the script used for the survey, a spreadsheet containing

[1] Defendants' media campaign included multiple newspaper advertisements regarding their position on the State of Oklahoma's claims about damages to the Illinois River Watershed. *See e.g.*, Ex. A.

the phone numbers of the individuals contacted in the survey, and the results of this survey, were produced to Defendants on January 5, 2009. Contrary to the speculation of Defendants' expert, this survey was not "excluded" from the CV Report because the "results were not beneficial" (Motion at 3-4); these results were considered by the State's experts as a precursor to the activities described below.[2]

After the telephone survey, the authors of the CV Report began a series of focus groups and one-on-one interviews, which are described in the CV Report. *See* Motion, Ex. 7, p. 3-3 to 3-5. The CV Report authors created the scripts and other materials for these events, conducted and participated in these events, and the materials the authors used for these events were produced to Defendants on January 5, 2009. The authors of the CV report hired two companies, Consumer Logic and Wilson Research Strategies, to recruit individuals for the focus groups and one-on-one interviews.

After the focus groups and one-on-one interviews, the authors of the CV Report conducted pretesting of the survey instrument, which is described on p. 3-6 of the Report. *See* Motion, Ex. 7, p. 3-6. All of the materials used by and the results gathered by the CV Report authors during the pretests were produced to Defendants on January 5, 2009. Consumer Logic assisted the CV Report authors by recruiting individuals to participate in the pretests.

In addition to the pretests, two pilot tests were conducted by Westat, a survey company retained by Stratus, prior to the final survey instrument entering the field. Westat submitted two reports on these pilot tests, which were attached as appendices to the CV Report, and all of the information the authors of the CV Report reviewed regarding the pilot tests was produced to

[2] Rather than hiring an expert to speculate about the reasoning behind the State's experts' actions, Defendants could have simply proceeded with the depositions of the State's experts who were offered for various dates between February 20 and March 2, 2009. *See* Ex. B (Xidis email to Ehrich offering deposition dates).

Defendants on January 5, 2009.

After the survey instrument was tested in the pilot studies, Westat hired interviewers who conducted in-person interviews for the main survey of Oklahoma residents. The interviewers received project-specific training from the authors of the CV report. During the interviews, the interviewers used a script and show cards developed by the authors of the CV Report. These training materials used by the CV authors, the script and the show cards, and the results of the main survey were all disclosed to Defendants on January 5, 2009. The results from the main survey were used by the CV Report authors in the CV Report, which provides an estimate of the monetary value on aesthetic and ecosystem injuries to the Illinois River system and Tenkiller Lake from 2009 to 2058 for the Illinois River system and from 2009 to 2068 for Tenkiller Lake. The method used to estimate the damages was the well-established contingent valuation methodology.[3]

As explained above, all of the substantive information from these events was produced to Defendants, and the relevant events were discussed at length in the CV Report and its appendices. The only information that Defendants do not have is the individual identifying information for the people who participated in these events and internal materials maintained by Consumer Logic, Wilson Research Strategies, and Westat that the CV Report authors never received or considered.

[3] As explained in the State's Motion for Protective Order and Integrated Memorandum in Support (Dkt. #1853), contingent valuation is a well-established and accepted survey-based economic methodology used to measure use and non-use values for a wide variety of things that do not have a readily determinable market value. Contingent valuation was developed over 60 years ago and over 6,000 papers have been published on contingent valuation. Contingent valuation has become one of the most widely used nonmarket valuations. *See* 59 Fed. Reg. 23098, 23100 (1994).

III. THE STATE'S EXPERT DISCLOSURE OF THE CV REPORT AND CORRESPONDING MATERIALS

Pursuant to the scheduling order in this case, on January 5, 2009, the State disclosed the CV Report, all of the materials considered by the authors of the report, and the vast majority of the experts' correspondence. On January 8, 2009, the State supplemented the January 5, 2009 production with a limited number of the experts' emails from the days that preceded the January 5, 2009 deadline, and attachments to the emails of Drs. Krosnick and Hanemann, which could not quickly be processed due to their Eudora-based university email systems. *See* Motion, Ex. 3. Otherwise, all of the materials in the files maintained by the authors of the CV Report for this project were produced on January 5, 2009.

On January 21, 2009, Defendants wrote to counsel for the State issuing a "demand" that the State "1) produce all materials as to the identity of, and contact information for, the survey participants and 2) produce the transcripts, videotapes and/or audio tapes of interviews of such survey participants." Motion, Ex. 8. On January 23, 2009, the State responded that because the authors of the report did not have the names of individuals who responded to the survey, this information was not part of their considered materials, and thus not produced. The State also explained, after confirming with the CV Report authors, that to its knowledge no transcripts, videotapes, or audiotapes of interviews were created. *See* Motion, Ex. 8.

Not satisfied with the State's response, counsel for the Tyson Defendants made additional demands.[4] *See* Ex. C (George and Xidis email exchange). Despite the fact that counsel for the Tyson Defendants was unable to provide any authority for his demand that the identities of the survey participants be produced, he continued his demands for this information and stated he

[4] In addition to accusing the State of "playing games" and taking a "ridiculous position," counsel for the Tyson Defendants significantly misstated the amount of damages set forth in the reports in his correspondence as "$800 Million." *See* Ex. C.

would call counsel for the State on January 26, 2009, to meet and confer on the issue of the identity of the main survey respondents. Counsel for Tyson did not contact the State on January 26, 2009, and on January 27, 2009, Defendants again made a "demand" for the identity of the main survey respondents, this time asking for "a listing of all housing units." Motion, Ex. 9. Defendants' January 27, 2009 email also demanded several items that were in fact contained in the January 5, 2009 production of materials. Defendants claimed they did not have (1) "the dataset used for the statistical analysis presented in the report," (2) "the 'do file' that corresponds to every table and every model in the report," and (3) passwords for 20 password-protected Westat files.

On January 29, 2009, the State explained that each of these three categories of items was, in fact, contained in the materials produced on January 5, 2009. For the password-protected Westat files, the State produced versions of these files that were *not* password-protected on January 5, 2009 so that Defendants would have access to the contents of these files. *See* Motion, Ex. 9. Thus, Defendants have indeed had access to the information in the Westat files in a fully accessible format since January 5, 2009 and received nothing new or different on January 29, 2009. The State simply provided the passwords so that Defendants would have the ability to verify this information. Defendants also demanded *one* article that, unbeknownst to the authors of the CV Report and the State, had become corrupted before Stratus provided it to the State for production. A new version of this article was produced to Defendants on February 3, 2009. *This one article is the only piece of information in the files of the authors of the report that was not accessible to Defendants in early January. See* Ex. E (Xidis and Ehrich Feb. 3, 2009 email exchange and attached article).

Counsel for the Tyson Defendants finally contacted counsel for the State the following

Wednesday, January 28, 2009, to meet and confer regarding the identities of the main survey participants. The parties were unable to reach an agreement, and the State anticipated Defendants would thereafter file a motion to compel on this limited issue as stated in counsel for the Tyson Defendants' January 23, 2009 email. Instead, on January 29 and 30, 2009, Defendants served subpoenas on Westat, Consumer Logic, and Wilson Research Strategies for not only the identities of the main survey participants, but the identities of all telephone survey participants, focus group participants, one-on-one interview participants, pretest participants and pilot test participants. *See* Motion, Ex. 11. In addition, Defendants' subpoenas sought all of the materials each of these entities created in their work on this case, material Defendants had not previously requested from or discussed in any manner with the State. *See* Motion, Ex. 11. Thereafter, each of these entities, as well as the State, objected to the subpoenas. *See* Motion, Exs. 10, 12-14.

On February 3, 2009, the State offered Defendants a variety of deposition dates for the authors of the CV Report. *See* Ex. B (Xidis Feb. 3, 2009 email to Ehrich). Defendants did not respond to this offer of deposition dates for the State experts.

On February 10, 2009, Defendants issued a *new* set of demands regarding the Stratus materials. Defendants demanded that the State provide Defendants with five categories of information for respondents *and* potential respondents to *not only the main CV survey*, which was the survey discussed in all of the prior correspondence and during the meet and confer, but for every respondent and potential respondent in the recreation study, telephone survey, focus groups, pretests, and pilot test. *See* Motion, Ex. 17. This request was the first time Defendants broadened their request to the State for the identities of the participants to activities beyond the

main survey.[5] For each of these groups of individuals, Defendants made a blanket request for 1) the number of times the person was contacted; 2) the comments made by each respondent or potential respondent when refusing to participate in any damages study conducted by Plaintiff; 3) the date that each respondent or potential respondent was last contacted; 4) the name of the interviewer for each respondent or potential respondent; and 5) the "record of actions" identified in the damages report. *See* Motion, Ex. 17. Defendants' request amounts to a blanket inquiry for 70 categories of information, which it appears Defendants have not even attempted to locate themselves in the production of materials. On February 12, 2009, the State responded that counsel would be happy to respond to specific questions once Defendants made a reasonable effort to review the production, but that the blanket request for the State to organize the production into the 70 categories of Defendants' choosing was inappropriate and burdensome, as that information was not maintained in that manner in the experts' files.[6] *See* Motion, Ex. 17.

On February 12, 2009, Defendants repeated the same request for the State to respond to their blanket request for the 70 categories of information, and requested an extension of three months for their expert disclosure deadline. On February 13, 2009, prior to Defendants filing their Motion to Compel,[7] the State declined Defendants' request, and again explained why their

[5] In footnote 1 of their Motion, Defendants attempt to claim that they requested all of the contact information for all of the individuals in the recreation study, the telephone survey, the focus groups, the pretests and the pilot tests since January 21, 2009, but a review of the correspondence (Motion, Exs. 8-9; Ex. C attached hereto) demonstrates that prior to February 10, Defendants' requests were limited to the main survey.

[6] On February 10, 2009, Defendants also repeated their prior request for videotapes, audiotapes, or transcripts of interviews, none of which exist to the knowledge of the State or the authors of the CV Report. On February 12, 2009, the State *again* explained that no such materials exist.

[7] Defendants repeatedly make the inaccurate statement in their Motion that the State did not respond to their request for an extension, which was made at the end of the day on February 12, 2009. The State responded on February 13, 2009, before Defendants filed their motion to compel. The State's response to their request is attached hereto as Ex. E.

requests for the 70 categories of information were unreasonable. *See* Ex. E, Xidis and Ehrich Feb. 12-13, 2009 email exchange.

On February 13, 2009, the State filed a Motion for Protective Order in order to provide appropriate protection to the identities of the individuals who participated in the recreation survey, telephone survey, focus groups, one-on-one interviews, pretests, pilot tests, and the main survey (Dkt. #1853). Shortly thereafter, Defendants filed their Motion to Compel (Dkt. #1854). To date, Defendants have never responded regarding scheduling the deposition dates for the authors of the CV Report.

IV. ARGUMENT

A. The State Has Already Produced All Materials Considered by the State's Damages Experts Pursuant To Fed. R. Civ. P. 26.

1. *The State has already satisfied its expert discovery obligations.*

Defendants argue at length that they "are entitled to the materials that form the foundation of the [State's] expert reports." (Motion at 9.) Defendants refuse to accept, however, that the State has already produced, pursuant to Fed. R. Civ. P. 26, all materials considered by the State's damages experts. By citing principles such as "[Rule 26] should lead counsel to expect that any written or tangible data provided to testifying experts will have to be disclosed," (Motion at 9), Defendants would have this Court believe that the State has withheld certain "written or tangible data provided to [the State's] testifying experts" on damages. But that is simply false. Defendants fail to tell the Court that the State has already produced a vast amount of survey-related information, including but not limited to:

1) A thorough description of the development of the survey instrument, including a description of the dates, locations, and number of participants in each of the focus groups;

2) descriptions of the one-on-one interviews, the pretesting, and pilot tests conducted as the survey instrument was developed;

3) materials used by the Stratus team during the focus groups, one-on-one surveys, pretesting, and pilot tests, including scripts, forms, images, and drafts;

4) all documents completed by focus group and pretesting respondents;

5) a complete explanation of the manner in which the sample for the survey was selected;

6) the project-specific materials created for training the interviewers who conducted the survey interviews;

7) a section by section explanation of the survey instrument itself;

8) working drafts of the survey instrument;

9) scripts, images, and materials used to conduct the survey interviews;

10) electronic data files transmitted from Westat to Stratus containing each of the responses every respondent provided;

11) correspondence between the Stratus experts and between the Stratus experts and Westat personnel;

12) files containing the analysis performed on the Westat survey data by the Stratus team and program scripts to conduct that analysis; and

13) three reports from Westat explaining its work on this project, as well as previous drafts of reports provided to the Stratus team members.

Defendants cite a number of non-binding survey-related cases for the non-controversial proposition that the value of a survey depends on the manner in which it was conducted. (Motion at 10, citing *Pittsburgh Press Club v. United States*, 579 F.2d 751 (3d Cir. 1978); *Rhodes Pharmacal Co. v. Fed. Trade Comm'n*, 208 F.2d 382 (7th Cir. 1953), *rev'd in part on other grounds*, 348 U.S. 940 (1955); *Gen. Motors Corp. v. Cadillac Marine & Boat Co.*, 226 F. Supp. 716 (W.D. Mich. 1964).) These cases lend Defendants little support, as the produced materials described above fully permit Defendants to assess the CV Report and the bases for that Report, and there are no additional "considered materials" to produce.

Defendants go on to argue that the State: (1) "rest[s] [its] objections to producing this

information on claims of work product protection and the protection afforded to opinions of non-testifying experts under Rule 26(b)(4)(B)," (Motion at 10-11); and (2) has waived such objections (Motion at 10). Although Defendants do not make clear what they mean by "this information," it is clear that Defendants have created a straw man with this argument.

The objection that the State did raise – as reflected in the letter cited by Defendants in support of their argument (Ex. 10 to Motion) and discussed more fully below – is to the disclosure of participants' personal identifying information, which might otherwise be responsive to the non-party subpoenas issued to Consumer Logic, Westat, and Wilson Research. Contrary to Defendants' assertion (Motion at 10), the State has not claimed work product protection over any materials considered by the State's damages experts. Accordingly, Defendants' analysis on pages 10-13 regarding the work product doctrine is inapposite.

2. ***Any personal identifying information of participants in the various phases of Survey development and administration of which Defendants seek production is not "considered material."***

In light of the fact that all materials considered by the Stratus experts have been produced, what is it that Defendants actually seek? Notably, Defendants' Motion rests largely on vague assertions to needing the "survey information," "this information," and "information sought." (*See, e.g.*, Motion at 8-10, 13.) Indeed, the only *specific* information Defendants identify in their Motion to Compel is the identities of the participants in all survey development and implementation phases.

First, to the extent that the State's testifying experts had any participant-identifying information in their possession, it has been produced.

Second, any other participant-identifying information is in the possession of non-parties Consumer Logic, Westat, and Wilson Research. Defendants issued subpoenas to these entities (attached as Exhibits A-C to the State's Motion for Protective Order (Dkt. #1853)), but never

attempted to meet and confer with these entities after they served written objections to the subpoenas pursuant to Fed. R. Civ. P. 45. *See* Ex. F (compendium of correspondence from counsel for Consumer Logic, Westat, and Wilson Research confirming lack of any contact from Defendants following written objections).

Thus, participant-identifying information that was never in the possession of the State's testifying experts does not constitute "considered materials," as Defendants argue on pages 13-15. Notably, Defendants do not cite *any* authority for their assertion that information neither relied upon nor in the possession of testifying experts is nonetheless "considered material" pursuant to Fed. R. Civ. P. 26. Instead, the authority upon which Defendants do rely regard general principles of trial testimony. (Motion at 14.)

Defendants next argue that they are entitled to the identities of all participants in the survey's development and implementation because certain identifying information of a limited number of individuals was provided to certain of the Stratus experts. (Motion at 15-16.) Defendants fail to acknowledge at least two issues on this point. First, *all* information in the possession of the Stratus experts – including any identifying information of survey participants or individuals in the sample – has been produced to Defendants. Second, Defendants' claim on page 15 that the State's testifying experts had the personal identifying information for "at least 189 of the CV survey participants" is misleading. These 189 individuals were not survey participants, but rather individuals who *declined to participate in the survey* and were identified as individuals who might be "converted" to participants. "Conversion" is a well-accepted survey technique. *See* Ex. G, ¶ 5 (Krosnick Decl.), Ex. H, ¶ 5 (Tourangeau Decl.). Two of the State's experts, Dr. Roger Tourangeau and Dr. Jon Krosnick, attempted to contact a subset of these 189 individuals, and these experts are unaware of any *specific* individuals who ultimately participated

in the survey. *See* Ex. G, ¶¶ 6 & 7 (Krosnick Decl.), Ex. H, ¶¶ 6 & 7. (Tourangeau Decl.). The State's experts made no other uses of the identifying information of either the 189 people or any other respondents throughout the entire assessment in reaching their conclusions and forming their opinions in this case. Moreover, Defendants' suggestion that the State's testifying experts participated in the administration of the main CV survey is simply incorrect.

In short, the fact that the information just described was used in part by the State's experts (and produced to Defendants) does not support Defendants' argument that they are entitled to information that was not in the possession of the State's testifying experts.

3. *Any personal identifying information of Study participants is not subject to disclosure.*

In any event, the personal identifying information of the participants in the survey development and administration is not subject to disclosure. This category of information is the subject of the State's Motion for Protective Order (Dkt. #1853), filed just prior to Defendants' Motion to Compel. Because the State's Motion for Protective Order fully addresses the significant public policy issues requiring the preservation of the confidentiality of participants' personal identifying information, that discussion is incorporated herein by reference. By way of brief summary, however, the law presumes that the confidentiality of such information will be preserved, and the ethical standards governing survey research as set forth by the two leading professional survey research associations, Council of American Survey Research Organizations and the American Association for Public Opinion Research, require such a result as a matter of public policy. *See* Federal Judicial Center's Reference Manual on Scientific Evidence 271-72 (2d ed. 2000); *see* additional authority cited in State's Motion for Protective Order (Dkt. #1853) at 10-13.

On page 18 of their Motion, however, Defendants assert that confidentiality concerns

surrounding the personal identifying information of survey participants do not warrant non-disclosure. Defendants' position is contrary to the guidance provided in the FJC Reference Manual, violates the ethical standards governing survey research, and goes against the well-reasoned case law discussed in detail in the State's Motion for Protective Order. Indeed, the non-binding authority Defendants cite in support of their argument that survey participants' identities should be disclosed is either inapplicable or not well-reasoned. Specifically, Defendants improperly rely on *U.S. Surgical Corp. v. Orris, Inc.*, 983 F. Supp. 963, 970 (D. Kan. 1997). Although the district court ordered disclosure of respondent-identifying information, the plaintiff had "refused defendants' request for the underlying data from the survey" and did not seek a protective order preventing disclosure. *Id.* at 965, 969. Here, the State has produced *all* materials considered by the State's damages experts. Moreover, the *Orris* court, in ordering disclosure, addressed only the issue of whether promises of confidentiality alone warranted non-disclosure. *Id.* at 970. Thus, it does not appear that the district court had before it well-developed briefing on the broader issue of confidentiality. The State has cited additional reasons in its Motion for Protective Order why preserving the confidentiality of survey participants' identities is appropriate and why the law presumes that confidentiality will be maintained even in the context of litigation. Stated another way, the State has not made the argument that respondent-identifying information should be protected on the basis of promises of confidentiality. The public policy reasons requiring the preservation of confidentiality go beyond promises of confidentiality.

Defendants' reliance on *Static Control Components, Inc. v. Lexmark Int'l, Inc.*, Nos. 02-571, 04-84, 2007 U.S. Dist. LEXIS 2469 (E.D. Ky. Jan. 10, 2007), and *In re Jobe Concrete Products, Inc.*, 101 S.W.3d 122 (Tex. App. 2002), is also misplaced. In *Static Control*

Components, although the district court adopted the magistrate judge's limited order of disclosure, it did so skeptically, suggesting that it may have come to a different decision had the standard of review been *de novo*. *Static Control Components*, 2007 U.S. Dist. LEXIS 2469, at *38. Moreover, in *In re Jobe Concrete Products*, the Texas Court of Appeals ruled in favor of disclosure of respondents' identities as a matter of Texas state law, rejecting arguments not made in the State's Motion for Protective Order.

In sum, confidentiality concerns do require that the personal identifying information of participants during the survey development and implementation phases remain confidential.

4. *Defendants have not meaningfully articulated why they need the Survey participants' identities.*

Other than making broad assertions about their purported need to know the participants' identities, Defendants fail to identify why they need the survey participants' identities or how they could properly use such information. In his Declaration attached to Defendants' Motion to Compel, Defendants' expert, William H. Desvousges, states that: "Without access to the individuals surveyed or questioned during the course of [the State's] damage evaluation, I am precluded from fully determining: [1] the effect of survey questionnaire design on the interviewees' responses and [the State's] damages calculation; [2] the rationale behind selecting a CV methodology after completing the telephone survey and recreational use intercept study; and [3] the totality of information provided to respondents during the interview." (Desvousges Decl. ¶ 25.) There is no explanation, however, why respondents' identities are necessary for any of these considerations. Indeed, no such explanation exists. *See* Ex. G, ¶ 9 (Krosnick Decl.), Ex. H, ¶ 9 (Tourangeau Decl.). With regard to the first item, Defendants are fully capable of evaluating the effect of the survey questionnaire design on responses by re-implementing the provided survey to a representative sample of the State's population similar to the State's

approach. The State makes no representation that a specific individual's response alone is sufficient to support the opinions and conclusions found by the State's experts, but that in total, using a representative sample of the State's population, the opinions and conclusions are supported. With regard to the second item, the rationale for selecting the CV methodology lies with the State and the State's experts. The respondents neither have information relevant to the decision nor participated in the decision as to which damages valuation methodology should be implemented. Moreover, with regard to the third item, Defendants already have "the totality of information provided to respondents during the interview."

In his Declaration, Dr. Desvousges also states that he needs respondents' personal identifying information to "evaluat[e] bias and non-response bias," (Desvousges Decl. ¶ 26). Defendants' brief and the Desvousges Declaration do not – and cannot, however – identify *any* standard survey research procedure to evaluate bias and non-response bias that involves or requires using respondents' personal identifying information. *See* Ex. G, ¶ 9 (Krosnick Decl.) Ex. H, ¶ 9 (Tourangeau Decl.). In the absence of such an articulation, Defendants cannot support their assertion that they need this information to assess the CV Report. Moreover, even if Defendants meaningfully articulated such a need, Defendants' request still could not prevail under the balancing test required to be applied in connection with the State's Motion for Protective Order to prevent disclosure or use of this information.

Simply put, Defendants utterly fail to adequately articulate a valid need for the respondents' identities. Defendants' Motion to Compel production of this information should be denied.

B. Defendants' Request to Modify the Scheduling Order Should Be Denied.

Defendants' request for a three-month extension of their deadline to serve expert

disclosures on damages, which would more than double the amount of time set forth in the scheduling order, is an unnecessary request that is clearly intended to derail the trial date in this case. The scheduling orders in this case have always contemplated two months (or less) between the disclosure of the State's expert reports on damages and Defendants' expert reports on damages. *See* Dkt. #1075 (March 9, 2007 Scheduling Order placing one month between the deadlines); Dkt. #1376 (Nov. 15, 2007 Amended Scheduling Order, setting the current deadlines).[8] Defendants sought and received numerous expert extensions in the past. *See, e.g.*, Dkt. ##1756, 1787, 1789 (granting Defendants numerous expert deadline extensions). Indeed, the State's experts worked tirelessly to ensure that the State met its January 5, 2009 deadline.

Fed. R. Civ. P. 16(b) states that "[a] schedule shall not be modified except upon a showing of good cause and by leave of the district judge or, when authorized by local rule, by a magistrate judge." *See also* Dkt. #1706 (May 15, 2008 Order) ("the court has admonished all parties that extensions of the scheduling order would be *rarely granted*, and only upon *unforeseeable good cause*") (emphasis added). "The 'good cause' standard primarily considers the diligence of the party seeking the amendment. The party seeking an extension must show that despite due diligence it could not have reasonably met the scheduled deadlines." *Deghand v. Wal-Mart Stores, Inc.*, 904 F. Supp. 1218, 1221 (D. Kan. 1995) (citations and quotations omitted); *see also Colorado Visionary Academy v. Medtronic, Inc.*, 194 F.R.D. 684, 687 (D. Colo. 2000). As Defendants have pointed out in one of their own briefs, "'scheduling orders must mean something if the parties and the court are ever to achieve some sort of finality.'" *See* Dkt. #1652 (quoting *ADC Telecommunications, Inc. v. Thomas & Betts Corp.*, 2001 WL 1381098, at *4 (D. Minn. Oct. 18, 2001)). The State agrees with Defendants' observation in that

[8] Defendants did not file objections to the Amended Scheduling Order.

brief: the good cause standard "is a demanding one." *See id.*

Allowing Defendants such an unwarranted extension at this phase of trial preparation would prejudice the State by disrupting the remaining deadlines in the case and delaying the trial of this matter. Defendants have failed to demonstrate good cause for an amendment to the scheduling order. Any lack of preparedness for the March 2, 2009 deadline that Defendants may be experiencing is of their own making, by their refusal to thoroughly review the materials produced to them, their refusal to depose the State's experts on damages prior to the March 2, 2009 deadline, and their insistence that they must have materials that they do not actually need in order to assess and respond to the State's expert reports on damages. Thus, Defendants' request for a three-month extension is unnecessary and should be denied. *See Deghand,* 904 F. Supp. at 1221 ("Carelessness is not compatible with a finding of diligence and offers no reason for a grant of relief").

1. *The lengthy extension requested by Defendants will disrupt the remaining deadlines in the scheduling order and the trial date.*

Defendants' claim "that no other dates in the Court's Schedule would be affected by this narrow extension" is not credible. Dkt. #1857 at 1. The trial of this case is scheduled for September 2009, and the succession of deadlines leading up to that trial date would be disrupted if Defendants' expert reports deadline was moved from March 2 to June 2, 2009. The deadlines that would be disrupted by such an extension are:

> Discovery Cut-Off – April 16, 2009
> Dispositive Motion Deadline – May 18, 2009
> Exchange of Exhibits and Deposition Designations – June 1, 2009
> Motions in Limine and Pre Trial Briefs – July 6, 2009

See Dkt. ##1376, 1658.

After Defendants disclose their expert reports on damages, the State is entitled to review those disclosures and corresponding materials, and then to depose Defendants' experts.

Extending Defendants' disclosure deadline would push the completion of these depositions into the months following that deadline. Thus, an extension of Defendants' expert disclosure deadline until June 2, 2009 will push the depositions of Defendants' experts into at least late June and July. The depositions of Defendants' damages experts could potentially impact the State's dispositive motions, which are due by May 18, 2009, and it certainly would impact the exhibits and deposition designations that are currently due on June 1, 2009. Furthermore, moving Defendants' deadline to June 3, 2009 would not allow the State sufficient time to review their reports and materials, prepare for and take the depositions, and then prepare and file any necessary motions in limine by the deadline of July 6, 2009. In short, the proposed three-month extension would necessarily derail the remaining deadlines and the September 2009 trial date in this case.

2. *Defendants' arguments in support of an extension are meritless*

Defendants' argument that the "sheer magnitude of Defendants' task" of reviewing the State's disclosures carries little weight. Voluminous expert disclosures have been the status quo for all parties in this case, and the substantial disclosure filed by the State should not have been a surprise to the Defendants. Defendants have had the CV Report and considered materials since early January 2009. Yet, into mid-February, Defendants continued to ask questions that could easily be answered by a review of the materials produced to them in early January. Defendants have an army of counsel working on this case to assist with the review of these materials, and their expert undoubtedly can obtain the assistance of others to help him with his work (which he most likely has already done).[9]

[9] Email correspondence between authors of the CV Report and the State's injury experts, which included a draft of the CV survey, was produced to Defendants in May of 2008 with the injury experts' correspondence. *See* Ex. I, StevensonCorr0001170.0001 - 0001173.0002. Thus,

Defendants also argue that the State should have provided the Defendants with the materials considered by the authors of the CV Report *prior* to the expert disclosure deadline for damages reports and accuse the State of "withholding" material by not disclosing materials *prior* to the disclosure deadline set by the Court. (*See* Motion at 21-22.) The orders and discovery cited by Defendants pertain only to environmental sampling and monitoring data and were never contemplated to apply to other types of information or expert work. When the substance of these orders and the underlying motions are examined, it is abundantly clear that these orders address the limited issue of environmental monitoring and sampling programs. *See* Dkt. ##1016, 1710.[10] Defendants' attempt to fabricate a duty for the State to disclose its experts' work before the expert disclosure deadline is not well taken and is a transparent effort to challenge the State's disclosure of the CV Report and considered materials, which were altogether appropriate and timely. The State has disclosed the CV Report and corresponding materials in accordance with this Court's orders and the Rules of Civil Procedure and had no obligation to do so before the disclosure deadline.

Defendants also claim that the State should have disclosed the CV Report and the work of the authors in response to Defendants' discovery rather than at the Court-ordered deadline for the disclosure. The State served appropriate objections to Defendants' inappropriate discovery

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the fact that the State was working with its damages experts on a contingent valuation survey should have presented no surprise to Defendants who have had a copy of a survey draft, and the identity of certain authors of the CV Report since the State's May 14, 2008 production.

[10] Docket #1016 was the Court's order granting a motion to compel by Defendant Cobb-Vantress seeking specific environmental sampling results, the scientific investigation of groundwater contamination, and documents relating to Defendants' waste disposal practices. This order also granted a motion to compel by Simmons Foods seeking specific scientific data such as the total phosphorus and nitrogen loading in the watershed. *See* Dkt. ##1016, 743, 844, 947 (Order and motions to compel). The second order cited by Defendants, Docket #1710, was the result of a continuation of the specific dispute regarding environmental sampling that did not expand the scope of the Court's prior ruling to damages discovery. *See* Dkt. #1710.

requests, including objections that discovery on these issues was inappropriate because it sought information known or opinions held by expert consultants retained by the Sate in anticipation in preparation for trial. *See* Motion, Ex. 18 (various discovery responses cited by Defendants in footnotes 4-10). Defendants failed to meet and confer or move to compel on these discovery requests, and even if they had, the State was not obligated to set forth its experts' opinions and work prior to the expert disclosure deadline. Thus, there was no wrongdoing or dilatory conduct by the State in regard to these discovery requests. If the Defendants disagreed with those objections, they had ample time to address those issues with the Court and failed to do so.

Defendants' argument accusing the State of "disclosure delays" misrepresents the facts surrounding the State's expert disclosure. The details of the State's proper and timely disclosures are set forth at length above. *See* supra pp. 1-9. Defendants claim in their argument for extension of time that Defendants did not have "password access" to certain Westat files until January 29, 2009. (Motion at 23.) This is false. The State made clear to Defendants on January 29 that Defendants did in fact have fully accessible versions of these files in their possession since January 5, 2009. *See* Motion, Ex. 9. Defendants also claim that "the last of [the State's] considered materials was not delivered until nearly a month after the deadline set forth in the scheduling order." This statement is grossly misleading. *One article* in the files of the authors, out of the collection of thousands of documents, had an electronic formatting problem that was resolved within one week of Defendants' request for a new version of this one article. *See* Ex. E. *One* delayed article out of thousands of timely produced documents and an extensive written report certainly does not justify Defendants' proposed three-month extension.

As explained at length in the State's Motion for Protective Order (Dkt. #1853), and above in this response, the State disagrees that Defendants are entitled to the identities of the individual

participants in the main survey and the various activities that preceded the main survey. Their unfounded request for this information does not warrant any extension.

Defendants' alleged need for an extension is not attributable to any action or inaction by the State, or to the volume of material disclosed (which Defendants also claim is insufficient as they seek yet *more* material in their overly burdensome subpoenas for every last scrap of administrative paper from the survey companies). Rather, the reality of the situation is that Defendants find themselves needing more time because of their own lack of diligence in reviewing the materials and preparing their expert disclosures in a timely manner, because they chose not to proceed with the State's experts' depositions as offered, and because they insist that they must have information that is irrelevant and unnecessary for critiquing the State's disclosures. *See* Ex. G, ¶ 9 (Krosnick Decl.), Ex. H ¶ 9 (Tourangeau Decl.). Defendants have created this situation themselves in an attempt to delay their deadlines, and ultimately delay the trial date. Defendants' dilatory conduct should not be tolerated, and certainly not endorsed, with the provision of an extension that will only result in prejudice to and delay for the State.

For the reasons stated herein, Defendants' request for an extension of time for their expert disclosures on damages should be denied.

V. CONCLUSION

For the foregoing reasons, the State respectfully submits that Defendants' Motion to Compel (Dkt. #1854) should be denied.

Respectfully Submitted,

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